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No. _____

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In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May the National Labor Relations Board enjoin an employer from maintaining a state court action against his employees for tortious conduct occurring during a labor dispute unless the employer can demonstrate, to the satisfaction of an NLRB administrative law judge, that his suit has substantive merit and is not tainted by improper motivation?

2. May the National Labor Relations Board enjoin an employer from maintaining a state court action against his employees when the suit is not based upon employee resort to the Board or upon issues pending before the Board or subject to Board jurisdiction?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The parties appearing in the caption of this case were the only parties to the proceedings in the Ninth Circuit.[1]

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[1] The petitioner is challenging the NLRB's order requiring it to terminate a state court suit against certain individuals. The defendants in that litigation thus have an interest in the outcome of this Petition. Their names are Ruth Helton, John Helton, Barbara Orr, Lawrence Orr, Cheryl Nichols, Carl Nichols, Carla Scott, Debra Mackie, and Dale Michaud. Their attorney is Michael J. Keenan, 316 West McDowell, Phoenix, Arizona 85003.

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OPINIONS BELOW

The opinion of the Court of Appeals was reported at 660 F.2d 1335. The opinion of the National Labor Relations Board was reported at 249 N.L.R.B. 155. A copy of each opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 12, 1981. A petition for rehearing was denied on March 2, 1982. This Petition for Certiorari was filed within 90 days of that denial. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are: 28 U.S.C. § 2283, and 29 U.S.C. §§ 158(a)(1), (3) and (4). The text of these statutes is set out in the Appendix hereto.

STATEMENT OF THE CASE

On August 8, 1978, Bill Johnson's Restaurants, Inc. (hereinafter "the Restaurant"), discharged Ruth Helton, one of its waitresses. She then filed a charge with the National Labor Relations Board (hereinafter "the Board" or "the NLRB"), alleging that she had been discharged for engaging in union organizational activity. On September 20, 1978, the NLRB Regional Director issued a complaint based on Helton's charge, alleging that her termination constituted an unfair labor practice under Sections 8(a)(1) and (3) of the National Labor Relations Act (hereinafter "the Act" or "the NLRA"), 29 U.S.C. §§ 158(a)(1), (3).

That same day, Helton and a number of her supporters, together with their spouses, friends and children, began picketing in front of the Restaurant, including walking back and forth across the Restaurant's two driveways. 660 F.2d at 1339.

On the third consecutive day of picketing, the demonstrators passed out leaflets to Restaurant customers and passersby which asserted, among other things, that the Board had issued a complaint against the Restaurant for unfair labor practices, that Helton had been discharged because of her union activity, and that waitresses

at the Restaurant were denied proper overtime pay, were subjected to "unwarranted sexual advances" and were compelled to use a "filthy restroom . . . with no soap, paper towels or toilet tissue provided." 660 F.2d at 1339-40. A number of waitress complaints against management were listed on the leaflet in a "somewhat ambiguous" manner, indicating, erroneously, that the NLRB had accused the Restaurant of *several* unfair labor practices. 660 F.2d at 1343.

Three days later, on September 25, 1978, the Restaurant filed a civil complaint in Arizona state court against the demonstrators, alleging that they had unlawfully interfered with the Restaurant's business operations, had published libelous statements in their leaflet, and were creating a threat to public safety. The complaint sought (a) an injunction against mass picketing, violence, trespass, and obstruction of Restaurant driveways, (b) an injunction against the continued publication of libelous statements and leaflets, and (c) compensation for the damages suffered as a result of these unlawful acts. The complaint was accompanied by an application for a temporary restraining order.

Following a hearing at which three of the demonstrators testified, the state court judge issued a temporary restraining order prohibiting trespass, violence or threats of violence, interference with the ingress and egress of Restaurant customers, and the use of more than four demonstrators in front of the Restaurant at any one time. The judge declined to extend the temporary restraining order to the alleged libel, but did set a date for hearing on the Restaurant's application for a preliminary injunction and did sign an order allowing expedited discovery in preparation for that hearing.

The day after the lawsuit was filed, Ruth Helton filed a second charge with the Board, alleging that the Restaurant's lawsuit constituted an unfair labor practice. Thereafter, the Board issued a second complaint, asserting that the Restaurant's filing and prosecution of its civil lawsuit (1) violated Section 8(a)(4) of the Act because it discriminated against employees for filing charges or giving testimony to the Board, and (2) violated Section 8(a)(1) of the Act because it interfered with, restrained or coerced employees in the exercise of their rights under the Act.

On October 27, 1978, the NLRB filed a petition in federal district court in Phoenix, seeking an injunction requiring the Restaurant to withdraw its state suit. The petition alleged that the state court action filed by the Restaurant was "coercive," was intended

to discourage employee resort to the Board, and was filed in retaliation for employee participation in protected activities. Following a hearing on November 1, 1978, District Judge Walter E. Craig entered a formal order denying the General Counsel's request for an injunction and specifically finding: (1) that the NLRB had no reasonable cause to believe that the Restaurant had filed its state court action for a coercive or discriminatory purpose or had intended to interfere with NLRB procedures, and (2) that the Restaurant's lawsuit demonstrated, on its face, that it was filed for lawful objectives. See footnote 6, page 12 *infra*.

Hearings on the two NLRB Complaints were held before an administrative law judge (hereinafter "the ALJ") in December 1978. While the ALJ was considering his decision, the defendants in the state court suit moved for summary judgment on the Restaurant's complaint. All parties submitted affidavits and briefs, and a hearing was held. On March 13, 1979, the state court judge granted the motion with respect to the business interference claims but denied summary judgment on the Restaurant's libel suit. Six months later, the ALJ rendered his decision, ruling that Helton had been discharged for her union activities, that the Restaurant's suit had insufficient factual support, and that the suit had been motivated by a desire to coerce and intimidate employees engaged in protected activity, in violation of Sections 8(a)(1) and (4) of the Act. His order required the Restaurant to withdraw the complaint it had filed in state court, and to reimburse the defendants named in that action for all legal expenses incurred in their defense of that suit, including expenses incurred in the prosecution of counterclaims which the defendants had filed.

The Restaurant thereafter submitted to the NLRB numerous exceptions to the ALJ's ruling. On April 28, 1980, the NLRB rendered its decision, which affirmed the ALJ's ruling with only minor modifications.

On May 20, 1980, the Restaurant petitioned the United States Court of Appeals for the Ninth Circuit to review and set aside the Board order. The NLRB thereafter filed a cross-application for enforcement of its order. The Ninth Circuit had jurisdiction of the appeal pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f). Oral argument was held on April 15, 1981. In its decision dated November 12, 1981, the Ninth Circuit ordered enforcement of the Board's order in its entirety. The Restaurant filed a Petition for Rehearing which was denied on March 2, 1982. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals Regarding The Appropriate Test For The Lawfulness Of An Employer Suit Against Employees.

The decision of the Ninth Circuit in this case represents the only occasion on which a Federal Court of Appeals has held that an employer's civil lawsuit against his employees violated the National Labor Relations Act despite the fact that the suit had a lawful objective on its face, was not based upon the defendant's utilization of Board procedures, and was not preempted by the NLRA. In a significant expansion of NLRB authority, the Ninth Circuit has ruled that the Board may compel an employer to terminate an otherwise proper state court lawsuit based upon (a) that agency's evaluation of the ultimate merits of the case, and (b) the agency's subjective determination of the plaintiff's "true" motivation for filing the action. Such a premise, if approved, will compel many employer plaintiffs to submit the merits of their lawsuits to an administrative law judge ("ALJ"), instead of to a state court judge, without benefit of discovery, preliminary motions, standard rules of evidence, or a civil judge and jury, on penalty of having their suits dismissed by the ALJ and an award of attorneys' fees entered against them if they fail to prove their case or the propriety of their motivation for suit.

The Ninth Circuit's holding that the NLRB may examine the merits of an employer's civil action and his motivation for suit places a harsh and unreasonable burden upon the state court litigant whose suit is challenged before the NLRB. Although the Ninth Circuit did state that the plaintiff need demonstrate only that "his claim is a colorable one" and has a "reasonable basis" (660 F.2d at 1342), it is obvious that a harsher test was in fact imposed. This conclusion is based upon: (1) the Ninth Circuit's unwillingness to hold that the Restaurant had demonstrated a "colorable" libel claim by introducing the demonstrators' leaflet proclaiming "filthy restrooms," "unwarranted sexual advances," and a refusal to pay lawful overtime compensation; (2) the court's refusal to acknowledge factual support for the Restaurant's libel suit in the face of the state court's ruling that the existence of factual issues precluded summary judgment for the defendants; (3) the Ninth Circuit's failure to find that "a reasonable basis" for the Restaurant's prayer for injunctive relief was demonstrated by the state court's decision, *after hearing*, to issue a restraining order against trespass, mass picketing, and improper interference with business; and (4) the Ninth Circuit's invalidation of the employer's suit even though it found that the

"civil lawsuit had a lawful objective on its face," and "sought relief for alleged wrongs that the state court could remedy." 660 F.2d at 1342. In compelling an employer to establish, to the satisfaction of an ALJ, that his civil action has substantive merit and that his motivation for suit is untainted, the Ninth Circuit has substantially departed from the standards applied by other Circuits.

In *Power Systems, Inc. v. NLRB*, 601 F.2d 936 (7th Cir. 1979), *denying enforcement to* 239 N.L.R.B. 445 (1978), for example, the Seventh Circuit held that as long as the employer's lawsuit has a "reasonable basis," it is not an unfair labor practice. In that case, the employer brought a civil action, alleging harassment, against an employee who had filed a charge against him with the NLRB and with the Occupational Safety and Health Administration ("OSHA"). The Seventh Circuit did not seek to determine whether the employee's NLRB and OSHA charges would support an action for harassment under state law; nor did the Seventh Circuit examine the employer's motive for filing suit. The employer's suit was found to have a "reasonable basis" — and thus not to constitute an unfair labor practice — merely by virtue of the fact that the defendant employee had a history of filing baseless charges against other employers and labor organizations. In contrast, the Ninth Circuit in the instant case was not willing to find a "reasonable basis" to the employer's suit on the grounds that the statements in the challenged leaflet, if false and published with malice, would constitute actionable libel and that the demonstrations, if expanded or disorderly, would improperly interfere with the employer's business. Instead, the Ninth Circuit, in conflict with the standard applied by the Seventh Circuit, improperly allowed the Board to evaluate the underlying motivation for the employer's litigation and to usurp the function of the state court by determining the substantive merit to the employer's judicial complaint.[2]

Power Systems is generally in accord with the more recent case of *United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017

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[2] The contrast between the standards applied by the Ninth and Seventh Circuits is further highlighted by the fact that the Board itself made the same findings in *Power Systems* that it made in *Bill Johnson's Restaurants — i.e.*, that the challenged conduct of the employee was reasonable and thus protected, that there was no evidence to support the employer's civil action, and that the motivation for suit was to penalize the defendant for protected activity. *See* 239 N.L.R.B. at 448; 249 N.L.R.B. at 164, 165.

(4th Cir.), *cert. denied*, 70 L. Ed. 2d 404 (1981). In that case, the Fourth Circuit found that an employer had committed an unfair labor practice by suing an employee for filing an NLRB charge. Unlike *Power Systems*, however, the employee had no history of frivolous claims. *United Credit Bureau* is the only appellate decision, other than the Ninth Circuit's ruling in the instant case, to hold an employer's civil suit against an employee to be an unfair labor practice. The Fourth Circuit's decision, though cited by the Ninth Circuit as supporting judicial review of an employer's "anti-union motive" for suit (660 F.2d at 1342-43), did not require an examination of the merits of the employer's suit or of his underlying motivation. Rather, that decision was based entirely on the content of the employer's state court complaint, which alleged that the defendant employee's resort to the Board was part of a fraudulent scheme.

Other appellate courts have indicated uncertainty as to reliance upon a motivation test in evaluating the propriety of an employer's suit. The Second Circuit, for example, has held that even if an employer, in filing suit against his employees, is "improperly motivated . . . , this alone would not make resort to the courts unlawful so as to justify an unfair labor practice finding." *Lodge 743, IAMAW v. United Aircraft Corp.*, 534 F.2d 422, 464-65 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). On the other hand, the Eighth Circuit recently declared that, although "the requirement of good faith has been diminished . . . , we do not believe that the requirement of looking into the union's or employer's purpose or motivation in the filing of a lawsuit has been abolished." *Associated General Contractors v. NLRB*, 637 F.2d 556, 561 (8th Cir. 1980).[3]

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[3] The decisions of the NLRB itself also evidence the confusion and lack of direction which exist with respect to the appropriate test for determining the legality under the NLRA of an employer's lawsuit against his employees. In the pivotal case of *Clyde Taylor Co.*, 127 N.L.R.B. 103, 109 (1960), the Board declared that it would not interfere with the employer's right to file suit in state court even though that suit was "part of a bad-faith scheme to defeat union organization." Eleven years later, in *United Aircraft Corp.*, 192 N.L.R.B. 382, 384 (1971), *mod.*, 534 F.2d 422 (2d Cir. 1975), the Board reconfirmed the *Clyde Taylor* rule that "the Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice." Thereafter, an exception to this rule was recognized where the object of the litigation was itself unlawful, such as enforcement of a hot-cargo or invalid union security clause. *See, e.g., United Stanford Employees, Local 680*, 232 N.L.R.B. 326 (1977), *enf'd*, 601 F.2d 980 (9th Cir. 1979). But the Board focused upon the plaintiff's declared objective for suit, as stated in

The Ninth Circuit has seriously departed from the rationale of the decisions rendered by the Second, Fourth and Seventh Circuits by upholding the NLRB's requirement that the employer prove the allegations of his civil suit to the satisfaction of an ALJ and demonstrate "proper" motivation for the suit. These conflicts among the Courts of Appeals, and the apparent confusion regarding the standard against which to measure the legality under the NLRA of an employer's civil suit against his employees, can, and hopefully will, be resolved by this Court.

B. The Ruling Below Conflicts With Decisions Of This Court Which Have Reserved Certain Responsibilities To State Courts During Labor Disputes.

This Court has had many occasions to defend litigants' rights to seek local judicial protection from tortious conduct during a labor dispute. *See, e.g., Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (trespass); *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977) (intentional infliction of emotional distress); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (libel); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954) (interference with business); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748 (1942) (mass picketing). In all these cases, this Court has emphasized the necessity of allowing state courts to rule upon matters of substantial local concern, even though other elements of the underlying labor dispute might be subject to NLRB jurisdiction.

In its opinion below, the Ninth Circuit acknowledged that the NLRA does not preempt state court jurisdiction over actions for libel arising in a labor context, as long as the plaintiff can establish

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the complaint, not his perceived ulterior motive. Thus, in *Television Wisconsin, Inc.*, 224 N.L.R.B. 722, 722 n.2 (1976), the Board held that a union's lawsuit was improper "not because of the Union's subjective intent but because of the unlawful objective sought by the Union." Until the instant case, the Board restrained itself from intruding unnecessarily into the parties' civil litigation. For example, in *S.E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), the Board ruled that no unfair labor practice had been committed by an employer who had filed a $50,000 libel suit against an employee, despite a finding that there was no basis to the libel claim. And in *Giant Food Markets, Inc.*, 241 N.L.R.B. 727, *enf'd*, 633 F.2d 18 (6th Cir. 1980), the Board found that an employer's lawsuit to enjoin peaceful picketing was not an unfair labor practice. The Board's radical departure from its own precedents in the instant case indicates the need for Supreme Court review.

malice. 660 F.2d at 1344. *See Linn v. United Plant Guard Workers, Local 114, supra.* However, the Ninth Circuit then proceeded to effectively nullify this Court's decision in *Linn* by holding that the plaintiff in the libel action may be denied an opportunity to prove his allegations in the state court proceeding unless he can first prove them to the satisfaction of an NLRB administrative law judge — despite severely limited discovery which impedes a plaintiff's ability to develop evidence that the offensive statements were published with knowledge of their falsity or with reckless disregard for the truth, as required by *Linn*. 383 U.S. at 64-65. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). If the ALJ, who is unlikely to possess expertise in the law of libel, determines that the employer has failed to present sufficient evidence to support his allegations, he may then, under the Ninth Circuit's ruling, order the civil proceeding dismissed.

This result and the procedure established by the Ninth Circuit are directly contrary to this Court's decision in *Linn*, which confirmed the state court's authority to determine the merits of a cause of action for defamation arising during a labor dispute. In the instant case, the Ninth Circuit expressed concern that the boundary between state and federal interests will be "hopelessly obscured" if a state court libel action arising out of a labor dispute is sustainable merely by virtue of the inclusion of allegations of malice in the complaint. 660 F.2d at 1344. In *Linn*, however, this Court specifically considered, and alleviated, that fear by requiring the state court to dismiss the complaint unless the plaintiff can *prove* his allegations of malice. 383 U.S. at 64-65. The impact of the Ninth Circuit's decision will be to substitute the ALJ for the state court judge as the evaluator of such proof, thereby (1) denying the employer the judicial benefits of a jury, discovery, motions, and strict rules of evidence, as well as the substantive expertise of the civil judge, and (2) denying the state court the ability to regulate a matter of particular local concern. The decision below enables the employee defendant to avoid state court proceedings and to compel the employer plaintiff to establish his claim in more onerous circumstances merely by filing a charge with the NLRB alleging that the suit was coercive.

It is the Ninth Circuit, we submit, which has misunderstood, and "hopelessly obscured," this Court's allocation of NLRB and state court responsibilities in labor disputes. For example, although the Ninth Circuit recognized that the state court is competent to decide the merits of an employer's libel suit, it also held that "the same determination . . . is one which the Board must make to decide whether filing the libel suit was an unfair labor practice." 660 F.2d

at 1344. Thus, according to the Ninth Circuit, once the Board "has actually decided the issue," that "would appear to preempt further action by the state court." *Id.* Under *Linn* and related cases, however, the NLRB, which does *not* have jurisdiction over libel claims, is *not* required, in deciding if a libel suit constitutes an unfair labor practice, to make "the same determination" as the court in which the suit was filed. The state court must determine, by a preponderance of the evidence, whether the employer can *substantiate* his allegations. The Board need determine only whether the employer's civil complaint *alleges* a cause of action which is not (a) preempted by the NLRA, (b) dependent upon issues then pending before, or submissible to, the Board, or (c) based upon employee resort to Board procedures. *See Capital Service, Inc. v. NLRB*, 347 U.S. 501, 503-04 (1954); *United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017, 1026 (4th Cir.), *cert. denied*, 70 L. Ed 2d 404 (1981). If the employer's suit survives this three-pronged test, there is no justification for the Board's intrusion into the local judicial process. Ample state remedies, in the form of malicious prosecution and abuse of process actions, or awards of attorneys' fees or punitive damages, exist where an employer files a groundless and improper suit. *See Lodge 743, IAMAW v. United Aircraft Corp.*, 534 F.2d 422, 464-65 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976).

The Ninth Circuit's decision also conflicts with guidelines provided by this Court in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). In that case, the Court held that Sears' trespass suit in state court was not preempted by the NLRA even though the company sought to enjoin picketing which was arguably protected by the Act. In so ruling, the Court cited a number of prior decisions in which it had identified compelling local interests warranting a finding of non-preemption. The Court noted that a common denominator in these cases was that "the conduct giving rise to the state cause of action (*e.g.*, violence, libel, or intentional infliction of emotional distress), if proved, would not be protected by § 7 of the NLRA, and therefore there existed no risk that state regulation of the conduct *alleged in the complaint* would result in prohibition of conduct protected by the federal Act." 436 U.S. at 196 n.25 (emphasis in original). Similarly, state regulation of the conduct alleged in the Restaurant's complaint — trespass, mass picketing, and libel — would in no way prohibit activity protected by the Act.

In holding that Sears' resort to the state court was not preempted by the NLRA, this Court pointed out that Sears had only three options to exercise in the face of the union's picketing: It could

permit the pickets to remain on its property; it could forcefully evict them; or it could seek protection under the state's trespass laws. Sears selected the third option, and this Court approved, finding that, "only by proceeding in state court . . . could Sears obtain an orderly resolution of the question whether the Union had a federal right to remain on its property." 436 U.S. at 202.[4] The Restaurant faced a similar selection of options when demonstrators were distributing offensive leaflets on the sidewalk in front of its premises in September 1978. The option chosen by the Restaurant — seeking an orderly judicial resolution of the parties' rights — was consistent with this Court's holding in *Sears*. The Ninth Circuit's condemnation of that approach was inconsistent with *Sears*.

C. The Anti-Injunction Act Bars The NLRB From Enjoining Civil Actions In State Courts Under The Circumstances Of This Case.

Since 1793, the Anti-Injunction Act, 28 U.S.C. § 2283, has prohibited federal courts from enjoining state court proceedings unless the injunction may be justified by one of three statutory exceptions.[5] The rationale for the statute is based on the "essentially federal nature of our national government," and the desire to prevent needless friction between the state and federal court systems by clearly delineating the proper boundaries within which each system may function. *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). Interference in the workings of a state court is no less abhorrent to this principle of federalism if the interference comes from a federal agency rather than from a federal court.

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[4] The Court nowhere suggested that Sears' suit would be proper only if its motivation was untainted, and Sears might well have been motivated by a desire to hinder the employees' organizational efforts. The picketing, which had been "peaceful and orderly," became ineffective when, by state court order, it was removed from Sears' property to the public sidewalks. 436 U.S. at 182-83, n.2. See Section "A", *supra*.

[5] The full text of the statute reads as follows:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

In its decision below, the Ninth Circuit disposed of the Anti-Injunction Act in one short paragraph, citing, for its belief that the Act does not bar an injunction in this matter, the rulings in *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954), and in *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971). Both are distinguishable from the instant case: In *Capital Service*, this Court held that the NLRB was not barred by Section 2283 from enjoining state court proceedings whose subject matter was then pending before the Board; in *Nash-Finch* this Court concluded that the NLRB may obtain an injunction against state court proceedings "where its federal power pre-empts the field." 404 U.S. at 144. In the instant case, the subject matter of the state lawsuit — libel, trespass, and improper interference with business — was neither pending before the Board nor subject to its jurisdiction. Therefore the rationale of *Nash-Finch* and *Capital Service* is not applicable here, and the Board's injunction was issued in violation of 28 U.S.C. § 2283.

D. The Decision Below Will Confuse State And Federal Relationships And Disturb The Balance Between The Rights Of Employers And The Protection Of Employees.

The decision below threatens a substantial disruption to the appropriate balances between state court and NLRB jurisdiction and between employer and employee rights. The Petitioner briefly notes the following undesirable consequences of the Ninth Circuit decision:

1. The Ninth Circuit affirmed the Board's order that the employer pay all legal expenses incurred by the demonstrators as a result of the civil suit, including expenses incurred in relation to the defendants' counterclaims (for libel, slander, malicious prosecution, and abuse of process). However, the state court ruled *against* the defendants on some of their counterclaims and set others down for trial. The litigation is still pending. If the state court defendants ultimately prevail on the merits of their counterclaims, they may certainly apply to the court for recovery of their costs and attorneys' fees. There is no justification, however, for requiring the employer to pay fees and costs which the defendants incur in prosecuting *meritless* counterclaims. This is an example of the extent of the Board's unwarranted intrusion into the local judicial process.

2. The decision below may lead to conflicts among the federal appellate courts, the NLRB, and the state courts regarding the merits of an employer's civil suit. The Ninth Circuit ruled that the employer who sues his employees must, when challenged by the NLRB,

produce evidence "making his claim a colorable one," 660 F.2d at 1342, and both the Court of Appeals and the Board found that the Restaurant's causes of action for mass picketing, trespass and libel lacked such a basis. The state court, however, clearly did not agree: First, it entered a temporary restraining order against mass picketing and trespass after a hearing at which three of the demonstrators testified, and second, it denied the demonstrators' motion for summary judgment on the Restaurant's cause of action for libel.[6] It is the state judge, not the NLRB administrative law judge, whose expertise in the areas of libel, trespass and tortious interference with business warrants deference.

3. The result of the decision below, if allowed to stand, will be that an employee may substantially limit an employer's ability to discover evidence relevant to a civil lawsuit simply by filing an unfair labor practice charge with the Board and thereby obtaining the umbrella of that agency in avoiding discovery. Furthermore, filing such a charge may allow the employee defendant to avoid state proceedings entirely and to obtain an NLRB trial of the merits of the state action, under circumstances more onerous to the employer.

4. The Ninth Circuit's decision has given an undue advantage, approaching an immunity, to picketing employees. Since any legal action taken by an employer in such circumstances will appear to be retaliatory, an employer who is confronted with mass picketing, trespass, libel, slander, business disparagement, threats of violence or other torts normally subject to state court jurisdiction, may well be reluctant, in the face of the decision below, to seek appropriate and swift state court relief, for fear that he could be required to pay legal expenses incurred by the demonstrators in defending his suit and in asserting any counterclaims. Faced with such a possibility, an employer who does not have the luxury of time to analyze the legal niceties of the situation may turn instead to self-help (such as physical force) to restrain the demonstrators' excesses. This Court,

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[6] In addition, a federal district court judge denied the Board's application for preliminary injunctive relief against the Restaurant's civil suit based on his finding that the Board "had no reasonable cause to believe that Respondent filed its lawsuit in the state court for a coercive or discriminatory purpose within the meaning of the Act, or that in so doing Respondent intended to interfere with the NLRB processes." *Price v. Bill Johnson's Restaurants, Inc.*, Civil No. 78-830, Jan. 22, 1979 (D. Ariz.) (per Craig, J.).

recognizing this possibility, has emphasized the need for unrestricted employer access to state courts in such situations. *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 202 (1978).

CONCLUSION

Due to the conflict among the Circuits on these issues, and the Ninth Circuit's deviation from standards and rulings established by this Court, we respectfully request that a writ of certiorari be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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